authority to issue such an order in the action at law, to which the widow, who had control of the body, was not a party, but that in the suit in equity, to which she was a party, such an order would be made, it being within the general powers of a court of equity, and in the furtherance of justice. In the principal case, however, the court rests its decision upon the ground that "neither the right of sepulture, nor the right to have the body remain untouched and unmolested, is an absolute and fixed right, but these rights must and should yield when they conflict with the public good or where the demands of justice require such subordination."

EVIDENCE—BURDEN OF PROOF.—In an action for the value of goods lost, and for damage to other goods, while stored in the defendant's warehouse, plaintiff made out a prima facie case by showing that he deposited the goods in the warehouse in good condition, which, on demand, the defendant failed to deliver, or else delivered in a damaged condition. The defendant requested and the court refused an instruction that the burden of proof was on the plaintiff, and that unless the weight of evidence was in favor of the plaintiff, a verdict should be returned for the defendant. *Held,* that the failure to give the charge requested was erroneous. *Berger* v. *St. Louis Storage & Commission Co.* (1908), — Mo. App. —, 114 S. W. 69.

This case brings up the question as to whether the burden of proof shifts from one side to the other during the course of the trial. Upon this point there is much confusion. One view of the matter is that as soon as the party upon whom the burden of proof originally rests makes out a prima facie case, the burden shifts to the other party, and if the latter makes out a prima facie defence, the burden is again shifted. Supporting this view, among other cases, are *Philadelphia & Reading R. R.* v. *Anderson,* 94 Pa. St. 351; *Campbell* v. *McCormac,* 90 N. C. 491; *McKenzie* v. *Oregon Improvement Co.,* 5 Wash. 409; *Succession* v. *Maginnis,* 44 La. Ann. 1043; *Meikel* v. *State Savings Institution,* 36 Ind. 355. The view of the present case would, however, appear to be the better doctrine. The burden of proof, as defined by the court, is the duty which rests upon a party asserting the affirmative of an issue, of establishing it by a preponderance of the evidence. Thus used, it never shifts from side to side. *Pease* v. *Cole,* 53 Conn. 53; *Scott* v. *Wood,* 81 Cal. 398; *Eastman* v. *Gould,* 63 N. H. 89; *Berringer* v. *Lake Superior Iron Co.,* 41 Mich. 305; *Farmers' Loan & Trust Co.* v. *Siefke,* 144 N. Y. 354; *Gay* v. *Bates,* 99 Mass. 263; *Wilder* v. *Cowles,* 100 Mass. 487; *Atkinson* v. *Goodrich Transportation Co.,* 69 Wis. 5; 2 ENC. EVI. 779. The burden of proof should be carefully distinguished from the burden of introducing evidence which may constantly shift from side to side during the course of the trial. Quite likely much of the confusion which exists on the subject is due to the failure to agree on just what is meant by the term "burden of proof."

EVIDENCE—COMPELLING ACCUSED TO CRIMINATE HIMSELF—WAIVER OF PRIVILEGE.—On his first trial for murder the defendant tobk the stand in his own behalf. After judgment against him he procured a new trial. At the

second trial his evidence, properly identified and reduced to writing by a stenographer at the first trial, was sought to be introduced by the state. Objection to its introduction was made on the ground that the reading of the defendant's testimony was equivalent to compelling him to testify, and that under the provisions of the constitution he could not be compelled to give evidence against himself. *Held,* that the accused, by waiving his privilege and taking the stand at one stage of the prosecution, waived it at every subsequent stage. *State* v. *Simmons* (1908), — Kan. —, 98 Pac. 277.

The present case follows a previous decision of the same court. *State* v. *Sorter,* 52 Kan. 531. But the fact that the accused testifies at the first trial is not a waiver to the extent that he may be compelled to testify at the second trial. 3 WIGMORE, EVIDENCE, § 2276. Although not mentioned in the opinion of the court, the reason upon which the present decision is based would appear to be simply that statements or admissions voluntarily made by a party are always evidence against him. This principle is too well settled to be any longer a matter of dispute. 1 THOMPSON, TRIALS, 528; GREENLEAF, EVIDENCE, Ed. 16, § 171; 2 WIGMORE, EVIDENCE, § 1048.

INSURANCE—"SOUND HEALTH" IN LIFE INSURANCE POLICY—MUST IT BE ACTUAL?—M., a lad, was insured by the defendant company by a policy stipulating "that no obligation is assumed—unless on the said date (of the policy) the assured is in sound health." The policy was dated May seventh. The testimony brought out that on April twenty-third preceding a doctor treated the boy for a soreness of the knee which at that time did not present any unusual symptoms, nor was the case diagnosed until the boy was sent to a hospital in August, when it was discovered that the sore was a cancerous growth which the hospital physician testified must have been in existence at least four months. Defendant's medical examiner did not make an examination of the knee. On this testimony the court below directed a verdict for the defendant. *Held,* that it is the fact of the actual sound health of the insured which determines the liability of the insurer, and not his apparent health or anyone's opinion of it. *Murphy* v. *Metropolitan Life Ins. Co.* (1908), — Minn. —, 118 N. W. 355.

The rule laid down by the Minnesota court seems to be a little too harsh if judged by the decided cases which have most carefully considered the precise point. *Barnes* v. *Mut. Life Ass'n,* 191 Pa. St. 618; *Conver* v. *Phoenix Mut. Life Ins. Co.,* 6 Fed. Cas., p. 368; *Goucher* v. *N. W. Traveling Men's Ass'n,* 20 Fed. 596. In *Barnes* v. *Mut. Life Ass'n,* insured was, at the delivery of the policy, in bed with a cold, and died of pneumonia within three days. The lower court properly, according to the opinion, charged the jury that if "to ordinary observation and outward appearance his health is reasonably such that he may with ordinary safety be insured,—the requirement of 'good health' is satisfied." The plaintiff recovered. Nor does a slight temporary disturbance not presenting characteristics of a dangerous disease avoid the policy. *Conver* v. *Phoenix Mut. Life Ins. Co.,* supra. On the other hand, *Packard* v. *Met. Life Ins. Co.,* 72 N. H. 1, and *Dorey* v. *Met. Life Ins. Co.,* 172 Mass. 234, would seem to support the rule laid down